

DJW/mat

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

CAMERON ARTHUR,

Plaintiff,

v.

No. 04-2022-KHV-DJW

CITY OF GALENA, KANSAS, et al.,

Defendants.

**ORDER**

Before the Court is Plaintiff's Motion for Order Disqualifying David R. Cooper as Counsel for Individual Defendants, or In the Alternative, an Order Directing David R. Cooper to Inform the Court of the Conflict for its Determination (doc. 5). Upon consideration of the request for relief, the Court will deny Plaintiff's Motion pending compliance by the individual defendants with the specific directives set forth below.

**Relevant Background**

In this lawsuit brought pursuant to 42 U.S.C. §§ 1983 and 1985, Plaintiff sues the City of Galena, Kansas, the members of the City Commission, and the City Manager alleging he unlawfully was terminated from his employment in retaliation for speaking out on matters of public concern. In its current procedural posture, the three members of the city commission and the City Manager named as defendants are sued in their individual capacities only; all claims asserted against those individuals in their official capacities were voluntarily dismissed by Plaintiff.

Relevant to the pending Motion, the remaining defendants – the City of Galena and Jamie Bell, Marian Davies, Scott Donaldson and Darrell Shoemaker in their individual capacities – all are

represented by David Cooper of Fisher, Patterson, Sayler & Smith, LLP. Plaintiff moves to disqualify Cooper from representing both the City of Galena and the remaining named Defendants in their individual capacities on grounds of an inherent conflict of interest. Cooper acknowledges the potential for a conflict under the facts presented, but argues prevailing law does not require his withdrawal until an actual conflict arises.

### **Discussion**

#### **A. General Rules Regarding Disqualification of Counsel**

The court has the inherent power to disqualify counsel “where necessary to preserve integrity of the adversary process.”<sup>1</sup> Motions to disqualify counsel are committed to the court’s sound discretion.<sup>2</sup> A motion to disqualify must be decided on its own facts, and the court must carefully balance the interest in protecting the integrity of the judicial process against the right of a party to have the counsel of its choice.<sup>3</sup>

The moving party bears the initial burden of going forward with evidence sufficient to establish a prima facie case that disqualification is warranted.<sup>4</sup> The ultimate burden of proof, however, lies with the attorney or firm whose disqualification is sought.<sup>5</sup>

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<sup>1</sup>*Field v. Freedman*, 527 F. Supp. 935, 940 (D. Kan. 1981).

<sup>2</sup>*Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373,1383 (10th Cir. 1994) (control of attorneys’ conduct in trial litigation within supervisory powers of judge and thus a matter of judicial discretion).

<sup>3</sup>*Kelling v. Bridgestone/Firestone, Inc.*, 93-1319-FGT, 1994 WL 723958, at \*10 (D. Kan. Oct. 17, 1994); *Regent Ins. Co. v. Ins. Co. of N.A.*, 804 F. Supp. 1387, 1390 (D. Kan. 1992).

<sup>4</sup>*Kelling*, 1994 WL 723958, at \*10 (citing *Regent Ins.*, 804 F. Supp. at 1390; *Pacific Employers Ins. Co. v. P. B. Hoidale Co., Inc.*, 789 F. Supp. 1112, 1113 (D. Kan. 1992)).

<sup>5</sup>*Id.*

## **B. Analysis**

Simultaneous representation of parties whose interests in litigation may conflict, as alleged here, is governed by Rule 1.7(b) of the Kansas Rules of Professional Conduct (KRPC”).<sup>6</sup> More specifically, KRPC 1.7(b) provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.<sup>7</sup>

In the context of a 42 U.S.C. § 1983 civil rights action, Rule 1.7(b) may require different attorneys represent a city and city officials as codefendants. For example, a conflict of interest develops when individual defendants sued in their individual capacities attempt to partially or completely avoid liability by showing they were acting within the scope of their official duties. If they can show their actions were in accord with city policy, but nonetheless violated a plaintiff's constitutional rights, their defense may provide the evidence plaintiff needs to establish liability against the city. If such a conflict develops, separate representation – and thus disqualification if the attorney represents multiple clients in the referenced matter – would be required.

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<sup>6</sup>The Model Rules of Professional Conduct have been adopted by the Kansas Supreme Court in Supreme Court Rule 226 and are known as the “Kansas Rules of Professional Conduct.” This Court has adopted the Kansas Rules of Professional Conduct as the “applicable standards of professional conduct” for lawyers appearing in this Court. *See* D. Kan. Rule 83.6.1.

<sup>7</sup>KRPC Rule 1.7(b).

Although decided under facts slightly different from those presented here, the Tenth Circuit Court of Appeals issued a decision that provides valuable guidance in dealing with Rule 1.7(b) conflicts of interest.<sup>8</sup> In *Johnson v. Board of County Commissioners*, former Sheriff's Department employees sued the Fremont County Board of Commissioners and the County Sheriff, in both his official capacity and as an individual, for sexual harassment. Defense counsel from a private law firm entered a limited appearance and filed an answer on behalf of the Sheriff in his official capacity only. The Sheriff, "in his individual capacity and pro se," filed various pleadings in the case. The trial court ultimately ruled that defense counsel could not enter a limited appearance purporting to represent the Sheriff in his official capacity only.

On appeal, the Tenth Circuit Court of Appeals noted that distinctions between suits against officials as individuals and suits against individuals in their official capacities give rise to differing and potentially conflicting defenses. In light of this potential conflict, the *Johnson* court explicitly adopted the following position with respect to representation of multiple clients:

While some courts have held separate representation is required in the face of the potential conflict, we decline to adopt a *per se* rule. We hold that when a potential conflict exists because of the different defenses available to a government official sued in his official and individual capacities, it is permissible, but not required, for the official to have separate counsel for his two capacities. Obviously, if the potential conflict matures into an actual material conflict, separate representation would be required.<sup>9</sup>

The *Johnson* court went on to emphasize the importance of adequately informing individual defendants about the workings of 42 U.S.C. § 1983 and the potential conflict between defenses for

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<sup>8</sup> *Johnson v. Bd. of Cty. Comm'rs for the Cty. of Fremont*, 85 F.3d 489, 493-94 (10th Cir. 1996), *cert. denied*, 519 U.S. 1042 (1996).

<sup>9</sup>*Id.* (citations omitted).

each defendant.<sup>10</sup> The court noted that it is the responsibility of the attorney and the district court to ensure that such an official is not under the impression that representation of the individual in his official capacity (or, as here, representation of the municipality) automatically will protect his or her individual interests sufficiently.”<sup>11</sup>

To serve these stated interests, the *Johnson* court “embraced” the Second Circuit’s procedure regarding conflicts of interest in section 1983 claims.<sup>12</sup> This procedure requires counsel to notify the district court and the defendants of the potential conflict and submit to the district court for determination the issue of whether the defendants fully understand the potential conflict and, if so, whether the defendants choose joint representation.<sup>13</sup> The court went on to note that the individual defendants should be told it is advisable that he or she obtain independent counsel on any individual capacity claim.<sup>14</sup>

Applying the procedure set forth in *Johnson* to the circumstances presented here, the Court finds it has a duty to ascertain (1) whether David Cooper reasonably believes representation of multiple clients in this matter will not adversely affect the interests of the clients represented; (2) whether the individual defendants have been notified of, and fully understand, the conflict situation presented; and (3) whether, in light of this information, the individual defendants still choose to retain the municipality’s attorney as counsel.

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<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* (citing *Kounitz v. Slaatten*, 901 F. Supp. 650, 658-59 (S.D.N.Y. 1995)).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

Accordingly, it is hereby ordered that Plaintiff's Motion to Disqualify defense counsel is denied, provided that the individual defendants in this matter submit affidavits on or before **June 11, 2004** stating that:

- the individual defendant understands that his attorney, David Cooper, reasonably believes representation of the municipality and the individual defendants in this matter will not adversely affect the interests of any of the clients represented;
- the individual defendant fully understands the nature of the conflict inherent in joint representation of himself in his individual capacity and of the municipality; and
- notwithstanding the nature of the inherent conflict, the individual defendant chooses to continue to retain the David Cooper as counsel.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this \_\_\_\_\_ day of October, 2004.

s/ David J. Waxse  
David J. Waxse  
United States Magistrate Judge

cc: All counsel and *pro se* parties